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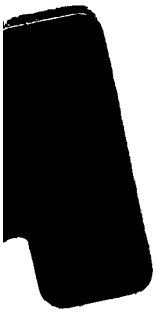

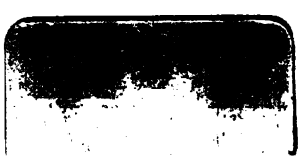

The Law of.....
Theater Tickets

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The

Law of Theater Tickets

by

S. P. Elias

of the San Francisco Bar

W. A. Hiester
San Francisco, Cal.
1905

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PREFACE.

The object of this brochure is to ascertain the legal status of the theater ticket, and to extract the law on the subject from the decided cases. As the theater ticket is an article of daily purchase and sale, which has been rarely discussed by the law writers, it is hoped that the treatise will prove of value to theatrical managers, and to the profession generally.

The scope of the book will comprehend the development of the several rights, duties and responsibilities of the seller and the purchaser of the ticket, of the manager of the theater, and of the spectator, insofar as they flow from the purchase or sale of the ticket. After the status of the ticket has been shown, it is intended to discuss the bearing of the recent amendments to the Federal Constitution, and of the civil rights statutes enacted by Congress in pursuance thereof, upon the theater ticket generally. The subject of racial discrimination, and the phases of the subject presented by State legislation upon the rights of colored persons and others to admission to theaters will then be fully treated. The subject of speculation in theater tickets will receive attention. Special reference will also be made to the laws passed by many States which directly affect the legal status of the theater ticket, and other matters of incidental importance to managers, having special reference to the theater ticket, will be noticed in their proper place. The design is to state the law fully, making particular reference to the facts and the text of the decisions where necessary. In fine, it is intended to render the work complete and practical.

S. P. ELIAS.

San Francisco, Cal., March 1st, 1905.
202 Sansome street.

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CHAPTER I.

THEATER TICKET A LICENSE.

A theater ticket is a simple license. It is a mere license to enter the theater, and remain there during the performance. It is a license for pleasure only.

This proposition was first established in the English case of *Wood vs. Leadbitter* (1). In this case, the plaintiff, Wood, had purchased a ticket of admission to the Doncaster Race Course, and upon this ticket was admitted to the enclosure attached to the grand stand. While the races were in progress, he was requested to leave, and was notified that if he did not go peaceably, force would be used to expel him. Upon his refusal to move from the stand, he was forcibly ejected. It was assumed at the trial that he had been guilty of no misconduct, and that his presence in the stand would have been justified by his possession of the ticket, had he not been requested to leave.

The trial court held that it was lawful for the proprietor, without assigning any reason for what he did, to order Wood to quit the enclosure, and that, if a reasonable time had elapsed after notice to depart had been given, during which Wood might have gone away, at the time of his removal, he was not on the place in question by leave and license of the defendant. The appellate court sustained the lower court, and in an opinion which contains an exhaustive review of the law and the authorities, held that the ticket gave Wood a simple license, saying: "We have only to say that, acting upon the doctrine relative to licenses, the direction given the jury was correct."

In an earlier English case, *Flight vs. Glossop* (2), one of the points involved was the construction of the free use and enjoyment of two boxes in a theater, given as a part consideration for certain agreements. It was held that the "agreement relating to the free use and enjoyment of the boxes is a mere personal covenant"—in effect holding that the right of entry to the theater was a simple license; and in *Coleman vs. Foster* (3), it was also held that the

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(1) 13 M. & W., 838.

(2) 2 Bing. N. C. 125; See *Scott vs. Howard*, 6 App. Cases, 295, House of Lords, 1881.

(3) 1 H. & N. 37.

liberty of free admission to a theater was a license, the court saying that "the liberty of free admission must be a license or it is nothing."

A case which followed the law as laid down in *Wood vs. Leadbitter,* and which clearly presented the status of the theater ticket, and the right it gave its holder, was the Irish case of *Malone vs. Harris* (4). In the opinion in this case, the Lord Chancellor said: "The right of admission is but a license to enter upon the premises of the licensor; there is not any grant of an interest in the subject of the license. It is simply a right of free entry for pleasure, granted for a pecuniary consideration, and so the case is governed by *Wood vs. Leadbitter.*"

The first case that arose in the United States in which the theater ticket was ruled upon was that of *McCrea vs. Marsh* (5), decided by the Supreme Court of Massachusetts in 1858. Plaintiff was excluded from a theater after he had bought at the box office, and offered at the door, one of the usual "dress circle" tickets. The verdict for the defendant was sustained on appeal; the court, in speaking of the permission to enter the dress circle obtained by the purchaser of the ticket, said: "It was a license legally revocable."

In *Burton vs. Scherpf* (6), another Massachusetts case, in which the facts were similar to the preceding case, the plaintiff entered the theater, and bought a ticket at the office. This ticket was delivered to the doorkeeper. The plaintiff was proceeding to his seat, when he was ordered out, and then forcibly ejected from the theater. The court held that "the sale of the ticket of admission to plaintiff was a license to plaintiff to enter the hall, and remain in it during the concert. The plaintiff had a mere license."

Purcell vs. Daly (7) was a New York case which arose out of the efforts of Augustin Daly, the proprietor of Daly's Theater in New York City, to stop speculation in tickets of admission to this theater. Tickets purchased on the street from a speculator were not honored at the theater, and the treasurer also refused to refund their purchase price when they were presented at the office by the holder. The holder then returned them to the speculator, who demanded that the treasurer repay him their cost. This was likewise refused. The speculator then assigned his alleged right to recover the price of the tickets to Purcell, who brought suit. The ticket issued by Daly contained the statement that it was a simple license, issued to the party

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(4) 11 Irish Ch. Reports, 33.

(5) 78 Mass. 211 71 Am. Dec. 745.

(6) 83 Mass. 133 79 Am. Dec. 717.

(7) 19 Abb. N. Cas. 301.

applying to the same by name, and was not transferable and would be refused at the door if sold or purchased on the street. The judgment dismissing the complaint was, on appeal, affirmed. In its decision, the court said: "A theater ticket is simply a license to the party presenting the same to witness a performance to be given at a certain time."

The gist of this decision is that the proprietor of a licensed place of amusement has the right to exclude a person from entering his premises, although the person refused has purchased a ticket of admission.

And in the recent case of *Collister vs. Hayman et al.* (8), it is said that "the weight of authority is to the effect that a theater ticket is merely a license given by the proprietor of a place of entertainment to the purchaser of that ticket to enter upon the premises of such proprietor to witness a performance" (9).

Having seen that the courts have uniformly construed the theater ticket to be a mere license, it may be well, at this point, to digress, and to explain, insofar as may be necessary, the meaning and nature of that which the law denominates a license. As used in its application to the law of theater tickets, the term takes the definition given to it in the law of real property (10), and is governed in its nature and incidents by the rules of that branch of jurisprudence (11). In the law of real property, a license is merely an authority to do an act or a series of acts upon the land of the person who grants the license, without conferring upon the licensee any estate or title in the land. Its effect is to make lawful and exempt from liability acts which, without the license, would be unlawful and a trespass, and a violation of the rights of the licensor (12).

Reasoning by analogy from the construction placed by the courts upon tickets of passage, it being uniformly held that a passage ticket in ordinary form is merely a voucher, token or receipt, adopted for convenience, to show that the passenger has paid his fare from one

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(8) 75 N. Y. Supp. 1102.

(9) See *Drew vs. Peer*, 93 Pa. St. 234.

(10) *Wood vs. Leadbitter*, 13 M. & W. 838; *Flight vs. Glossop*, 2 Bing. N. C. 125; *Coleman vs. Foster*, 1 H. & N. 37; *Malone vs. Harris*, 11 Irish Ch. Reports, 33; *McCrea vs. Marsh*, 12 Gray, 211; 71 Am. Dec. 745; *Burton vs. Scherpf*, 83 Mass. 133 ?? Am. Dec. 717; *Purcell vs. Daly*, 19 Abb. N. Cas. 301; *Collister vs. Hayman*, 75 N. Y. Sup. 1102.

(11) Cases in preceding note.

(12) Am. & Eng. Enc. of Law, Vol. 18, p. 1127, et seq.; Hopkins, Real Property, 165; Boone, Real Property, Title, Licenses.

place to another, and does not constitute the contract of carriage, although it may, and often does, have upon it some condition which enters into and forms a part of the contract (13), it may, technically speaking, be said that the theater ticket is merely a voucher, token or receipt, also adopted by the manager of the theater for convenience, to show that the purchaser has paid the price of admission to the theater and has received from the management a license to enter the same, and to occupy a certain seat during the performance therein given, and that it is evidence of the contract between the manager of the theater and the purchaser of the ticket for such license (14).

In other words, a theater ticket gives to the holder the mere right to go into the theater for the purpose of witnessing the performance therein given, when, without such ticket or license, his presence in such place of amusement would be unlawful, and he would be a trespasser.

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(13) Am. & Eng. Enc. of Law (1st Ed.), Vol 25, p. 1074; Fetter, Carriers, Sec. 275; Ex parte Lorenzen, 128 Cal. 431 50 L. R. A. 55; Hale, Bailments and Carriers, Sec. 109.

(14) *McCrea vs. Marsh*, 78 Mass. 211 71 Am. Dec. 745; *Purcell vs. Daly*, 19 Abb. N. C. 301; *Burton vs. Scherpf*, 83 Mass. 133 79 Am. Dec. 717.

CHAPTER II.

REVOCABILITY OF THE THEATER TICKET.

A theater ticket is revocable at will. This is so whether or not a consideration has been paid for it.

The license which the theater ticket gives may be revoked at any time by the proprietor or manager of the theater. This is true whether the manager has or has not returned, or has or has not made an offer to return, the consideration paid for the ticket. The same right to revoke also exists where no consideration was originally paid.

It seems also that the assignment or lease of the theater to other parties terminates the license given by a theater ticket.

The proposition that a simple license is legally revocable at will is fundamental in the law of licenses, for it is a general rule that a license may be revoked at any time (1). This is so, though the license is under seal (2), or written (3), or founded upon a consideration (4). It may be revoked by express words to that effect (5), or by other acts of the licensor indicating an intention to revoke (6), as by a conveyance of property over which the license is to be exercised (7). The revocation may be by agent (8). Death of either

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(1) *Wood vs. Leadbitter*, 13 M. & W. 838; *McCrea vs. Marsh*, 12 Gray, 211, 71 Am. Dec. 745; *Burton vs. Scherpf*, 83 Mass. 133, 79 Am. Dec. 718; *Am. & Eng. Enc. of Law*, Vol. 18, pp. 1140, 1143; *Hopkins, Real Property*, 167; *Boone, Real Property*, title, Licenses.

(2) *Wood vs. Leadbitter*, 13 M. & W. 838; *Wood vs. Manley*, 11 Ad. & El. 34; *Wallis vs. Harrison*, 4 M. & W. 539; *Jackson vs. Babcock*, 4 Johns. (N. Y.) 418.

(3) *Tilloston vs. Preston*, 7 Johns. (N. Y.) 285, and cases in preceding note.

(4) *Wood vs. Leadbitter*, 13 M. & W. 838; *Cook vs. Ferbert*, 145 Mo. 462; *Fentiman vs. Smith*, 4 East. 107; *Cocker vs. Cowper*, 1 C. M. & R. 418; *Burton vs. Scherpf*, 83 Mass. 133, 79 Am. Dec. 718; *McCrea vs. Marsh*, 12 Gray, 211, 71 Am. Dec. 745; *Hewlins vs. Shippam*, 5 B. & C. 222; *Bryan vs. Whistler*, 8 B. & C. 228.

(5) *Troxell vs. Iron Co.*, 42 Pa. St. 513; *Barksdale vs. Hairston*, 81 Va. 764.

(6) *Hyde vs. Graham*, 1 H. & C. 593; *Nichols vs. Peck*, 70 Conn. 439; *Simpson vs. Wright*, 21 Ill. App. 67; *Johnson vs. Skillman*, 29 Minn. 95, 43 Am. Rep. 192; *Hazelton vs. Putnam*, 3 Pin. 107, 54 Am. Dec. 158; *Prince vs. Case*, 10 Conn. 375, 27 Am. Dec. 675.

(7) *Coleman vs. Foster*, 1 H. & N. 37; *Wallis vs. Harrison*, 4 M. & W. 538; *Woodward vs. Seely*, 11 Ill. 158, 50 Am. Dec. 445; *Haux vs. Seat*, 26 Mo. 178, 72 Am. Dec. 202.

(8) *Kellog vs. Robinson*, 32 Conn. 335; *Wood vs. Leadbitter*

party operates as a revocation (9). No formal notice of revocation is necessary (10).

The doctrine of the revocability of the theater ticket has been uniformly maintained in the cases which treat of the ticket's legal status.

In *Wood vs. Leadbitter* (11), the distinct point involved was the revocability of the ticket, it being held revocable because it gave only a license, and this without regard to whether or not the consideration was returned. After defining a license in the following words, "A license properly passes no interest, nor alters or transfers property in anything, but only makes an action lawful which, without it, had been unlawful," the court says further, "a mere license is revocable." Continuing, the court says: "It was suggested that in the present case a distinction might exist by reason of the plaintiff's having paid a valuable consideration for the privilege of going on the stand. But this fact makes no difference. It is sufficient upon this point to say that in several of the cases we have cited, the alleged license was granted for a valuable consideration, but that was not held to make any difference."

In *McCrea vs. Marsh* (12), a consideration was paid for the ticket and its holder was refused admission. The court said: "Assuming that the plaintiff, by the purchase of the ticket from the defendant, obtained permission to enter the family circle in his own person, and occupy a place there during the exhibition, and yet it was only an executory contract. It was a license legally revocable and was revoked. After it was revoked, the plaintiff's attempts to enter were unwarranted. According to *Wood vs. Leadbitter,* even if plaintiff had been permitted to enter the family circle, the defendant might have ordered him to leave it at any time during the exhibition."

In *Burton vs. Scherpf* (13), the court said: "The sale of the ticket to plaintiff was a license to him to enter the hall, and to remain in it during the concert. But it was revoked immediately upon entrance of the plaintiff into the hall. By remaining there

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(9) *Pym vs. Harrison,* 33 L. T. N. S. 796; *De Haro vs. United States,* 5 Wall. 599; *Jensen vs. Hunter,* (Cal.) 41 Pac. Rep. 14; *Lambe vs. Manning,* 171 Ill. 612; *Spacy vs. Evans,* 152 Ind. 451; *Carter vs. Harlan,* 6 Md. 20; *Hodgkins vs. Farrington,* 150 Mass. 19, 15 Am. St. Rep. 168; *Putney vs. Day,* 6 N. H. 430, 25 Am. Dec. 470; *Bruley vs. Garvin,* 105 Wis. 625.

(10) *Wilson vs. R. R. Co.,* 41 Minn. 56.

(11) 13 M. & W. 838.

(12) 78 Mass. 211, 71 Am. Dec. 745.

(13) 83 Mass. 133, 79 Am. Dec. 717.

afterward, and refusing to depart, he became a trespasser. The defendant had a right to remove him."

In *Purcell vs. Daly* (14), the court made this statement: "A theater ticket is simply a license, * * * and, being a license, personal in its character, can be revoked"; citing *Wood vs. Leadbitter* and *Mendenhall vs. Klinck* (15). The recent case of *Collister vs. Hayman* (16) is to the same effect.

Not only does it appear that the theater ticket is revocable, but, following the theory of the law of licenses, it has also been held that the transfer of the theater revokes the license given by the ticket (17).

In *Coleman vs. Foster*, the owners leased the theater to S., reserving to themselves liberty of free admission to the theater. S. let the theater to plaintiff for two nights, subject to the terms upon which he held the theater. The defendant, as one of the original proprietors, entered the theater, and was sued for damages as a trespasser. It was held that the right of free admission was a simple license, that the license was determined, and that trespass could be maintained against the defendant, a proprietor who entered during plaintiff's tenancy. The court says: "If a man gives a license and then parts with the property over which the privilege is to be exercised, the license is gone" (18). And so in *Malone vs. Harris* (19), the owner of a theater by deed for a valuable consideration, agreed that certain persons who held certain securities should have free tickets of admission to the theater for themselves, and that they also have the right to issue such tickets to others. The plaintiff, as one of the security holders, was entitled to the benefit of the deed, but had lost his security. The defendant, having become lessee of the theater, with notice of the provision of the deed, refused to permit plaintiff to exercise any of the privileges as a security holder. The plaintiff then sued to specifically enforce the privilege of free admission, but judgment went for defendant. The court said: "The privilege conferred is personal. There was a right of free admission to the theater by tickets, now sought to be enforced. The right to admission is

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(14) 19 Abb. N. C. 301.

(15) 51 N. Y. 246.

(16) *Collister vs. Hayman, et al.*, 75 N. Y. Supp. 1102.

(17) *Coleman vs. Foster*, 1 H. & N. 37; *Malone vs. Harris*, 11 Irish Ch. Rep. 33; *Flight vs. Glossop*, 2 Bing. (N. C.) 125; compare *Morse vs. Cheney*, 22 Fed. 380.

(18) See *Turner vs. R. & D. R. Co.*, 70 N. C. 1.

(19) 11 Irish Ch. Rep. 33.

but a license. It (the license) purports to be assignable, but it seems to me to be neither assignable nor transferable. The case is governed by *Wood vs. Leadbitter.*"

A pass to a theater, given gratuitously, is likewise a mere revocable license (20). The fact that the right of entrance is by pass does not alter the relation of the manager to the ticket holder, nor of the latter to the former. The same principles of law prevail as where the right to enter the theater is given by ticket purchased in due course, or by pass given for a consideration.

The general doctrine of the revocability of the theater ticket is subject to the provisions of affirmative State legislation on theaters and places of amusements. The regulation of theaters is within the police power of the State, and where the Legislature has passed statutes regulating admissions to theaters, these statutes must necessarily prevail and may make a theater ticket irrevocable (21).

The State of California in 1893 passed an anomalous statute which materially affects the status of the theater ticket in that State (22).

The statute provides that "it shall be unlawful for any corporation, person, or association, or the proprietor, lessee, or the agent of either, of any opera house, theater, etc., or other place of public amusement or entertainment, to refuse admittance to any person over the age of twenty-one years, who presents a ticket of admission acquired by purchase, and who demands admission to such place; provided, that any person under the influence of liquor, or who is guilty of boisterous conduct, or any person of lewd or immoral character, may be excluded from such place of amusement." Any person who is refused admission to any place of amusement contrary to the provisions of this act is entitled to recover from the proprietor, lessee, or their agents, or from any person, association or corporation, or the directors thereof, his actual damages and one hundred dollars in addition thereto.

This statute has been held constitutional (23). The purpose of the statute is clearly to deprive the theater ticket, except in the cases mentioned in the statute, of the quality of revocability which

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(20) *Flight vs. Glossup*, 2 Bing. (N. C.) 125; *Coleman vs. Foster*, 1 H. & N. 37; *Malone vs. Harris*, 11 Irish Ch. Rep. 33; *Wood vs. Leadbitter*, 13 M. & W. 838; *Turner vs. R. & D. R. Co.*, 70 N. C. 1; *N. Y. Co. vs. Ketchum*, 27 Conn. 170.

(21) *Greenberg vs. Western Turf Assn.*, 140 Cal. 357; 75 Pac. 1050.

(22) Stat. 1893, p. 220.

(23) *Greenberg vs. Western Turf Assn.*, 140 Cal. 357, 73 Pac. 1050.

attaches to it under the general doctrines of the law, and such was the decision of the court. As the statute makes it unlawful to refuse admittance to a person who presents a ticket "acquired by purchase," and, as a ticket may be acquired by purchase from the management of the theater as well as from any other person, the word "purchase" being used in its ordinary and popular acceptation of the transmission of property from one person to another by their voluntary act and agreement, founded upon a consideration, it is for the courts to determine whether this statute also affects the quality of non-assignability which attaches in the law to the theater ticket as a license.

In the statute just referred to, it is provided that drunken, boisterous and immoral people may be excluded from the theater. This would be true in the absence of statute, for the theater is a private business enterprise whose proprietor may make such rules as he chooses for its management, and in the absence of statute, may admit or exclude whom he desires, except that where there is a civil rights law there must be no discrimination based on color or race. Otherwise, the manager may make such rules as he deems proper, and persons may be excluded who fail to observe them, or who do not come within their provision. Objectionable persons or characters may always be excluded from a theater. Spectators in the theater whose conduct is disorderly or offensive, or who persistently violate the rules of the house, or interfere with the comfort of other patrons, may be ejected after reasonable notice to depart, by the use of no more than necessary force (24). In such cases the safer course is to refund the purchase price of the ticket.

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(24) *Hutchins vs. Durham,* 118 N. C. 457.

CHAPTER III.

NON-ASSIGNABILITY OF THE THEATER TICKET.

A theater ticket is neither assignable nor transferable.

Any attempt to assign the license given by the ticket will terminate the holder's right thereto.

The proprietor or manager of the theater may annex to the ticket of admission issued by him the condition that it is not transferable, and that, if transferred, it shall be worthless.

It is a general principle of the law of licenses that a license, being strictly confined to the original parties thereto, and being purely a matter of personal privilege, is not assignable, and can operate neither for nor against a third person (1). It is incapable of being assigned or transferred by the person to whom it is granted (2). It is so much a matter of personal trust and confidence that it does not extend to any one but the licensee (3). It is likewise personal as to the grantor (4). And it has been held that an attempt to assign the license will terminate the licensee's right thereto (5).

From the analogies of the law of licenses—a theater ticket being uniformly held to be a license—the conclusion is drawn that a theater ticket is non-assignable. As regards its revocability at will, the courts have followed the law of licenses, and it has also been held, following the general principles of the subject, that the transfer or conveyance of the theater or the place upon or in which the license is to be exercised, operates to revoke the license already given by the ticket. And it may be conceived that the courts, when the distinct point of non-assignability of the ticket, unencumbered by specific restrictions on the ticket, is presented, will hold, as they have done in construing

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(1) *Am. & Eng. Enc. of Law*, Vol. 18, p. 1140; *Hopkins, Real Property*, 165, 166; *Boone, Real Property*, title, Licenses.

(2) Citations in previous note.

(3) *Ruggles vs. Lesure*, 24 Pick. 190; *Emerson vs. Fisk*, 6 Me. 200, 19 Am. Dec. 206; *Coleman vs. Foster*, 37 Eng. L. & Eq. 489; *Harris vs. Gillingham*, 6 N. H. 9, 23 Am. Dec. 700; *Dark vs. Johnston*, 55 Pa. St. 164, 93 Am. Dec. 732; *Pearson vs. Hartman*, 100 Pa. St. 84.

(4) *Yeakel vs. Jacob*, 33 Pa. St. 376; *Riddlee vs. Brown*, 20 Ala. 412, 56 Am. Dec. 202.

(5) *Sterling vs. Warden*, 51 N. H. 217, 12 Am. Rep. 80; *Jackson vs. Babcock*, 4 Johns. (N. Y.) 418; *Dark vs. Johnston*, 55 Pa. St. 164, 93 Am. Dec. 732.

the rights of a licensee in other cases, that the holder of a ticket cannot, by an assignment or transfer of the ticket, grant to another his right to enter the theater. For a theater ticket is a license, and a license is personal to the licensee, and is in its inherent nature non-assignable, and therefore the theater ticket is non-assignable. Besides, it has been held, an attempted assignment by the licensee of the license will terminate his right thereto (6).

In *Coleman vs. Foster* (7), where there was a liberty of free admission, and the theater was leased to a third party, subject to the conditions of the demise, the court said: "In order to be an excuse for a trespass, the alleged liberty of admission must be a license, or it is nothing. It conveys no interest. If a man gives a license, and then parts with the property over which the privilege is to be exercised, the license is gone. A license is a thing so evanescent that it cannot be transferred." And in *Malone vs. Harris* (8), where the defendant became the lessee of the theater, with notice of the provisions of the deed, whereby certain holders of securities should have free tickets of admission to the theater, the court, in speaking of the transferability of the license reserved, said:

"There was a right of free admission by tickets. * * * The right of admission is but a license to enter upon the premises of the licensor. There is not a grant of an interest in the subject of the license. If this be a license to enter upon the premises in which it grants nothing by way of interest, but simply a license for pleasure, there is nothing to attach an equity to the premises in the occupation of the respondents. It purports to be assignable, but it seems to me to be neither assignable nor transferable. In Shepherd's *Touchstone* (Vol 1, p. 239) it is said: 'Licenses and authorities are grantable at first for lives of the parties and for years, but the grantees of them cannot assign them over.'"

That a theater ticket is not salable or transferable by the purchaser was distinctly held in the recent case of *Collister vs. Hayman et al.* (9), which arose out of the efforts of Albert Hayman to destroy speculation in tickets of admission to the Knickerbocker Theater in New York City.

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(6) *Sterling vs. Warden*, 51 N. H. 217, 12 Am. Rep. 80; *Jackson vs. Babcock*, 4 Johns. (N. Y.) 418; *Dark vs. Johnston*, 55 Pa. St. 164, 93 Am. Dec. 732.

(7) 1 H. & N. 37.

(8) 11 Irish Ch. Rep. 33, and see also *Flight vs. Glossop*. 2 Bing. (N. C.) 125.

(9) 75 N. Y. Supp. 1102; see *Greenberg vs. Western Turf Assn.*, 73 Pac. 1050.

The plaintiff, describing himself as a broker or speculator in theater tickets under a license granted by the municipal authorities of New York City, sued the defendants as the proprietors and managers of the theater, to restrain them from interfering with him in the prosecution of his business of selling upon the sidewalk, outside of the prohibited limits, tickets of admission to the Knickerbocker Theater, to require them to remove a certain sign from the entrance to the theater, and to compel them to desist from employing or allowing persons to interfere in the manner indicated, or in any other manner, with the plaintiff, and also to enjoin them from refusing to accept tickets from persons who purchased them on the street from speculators.

It appeared that the defendants had placed upon the theater building a conspicuous sign, warning the public against buying tickets from plaintiff, and declaring that such tickets would not be recognized or received by them, and that the purchasers thereof would not be permitted to enter the theater upon such tickets, and also that defendants had employed agents or servants who approached persons intending to purchase tickets from plaintiff and who warned such persons against purchasing, and declared that if such purchases were made the tickets would not be received at the theater.

The order denying the injunction prayed for was affirmed upon appeal, the court in its opinion saying: "That plaintiff is engaged in a lawful business is not material to the discussion. He has purchased a privilege from the city to buy and sell theater tickets, but that privilege relates only to the right to buy and sell that which is purchasable and vendible. The privilege accorded by the city authorities cannot change the inherent nature of a theater ticket. If that ticket is something that can be bought and sold by any one, then there would be a good ground to support plaintiff's contention. The weight of authority is to the effect that a theater ticket is merely a license given by the proprietor of the place of entertainment to the purchaser of that ticket to enter upon the premises of such proprietor to witness a performance, and that in its nature is a revocable license. If the theater ticket is a mere personal license, it is not salable or transferable."

The conditions frequently printed upon theater tickets, declaring their character as a license, the control which the manager intends to retain over them, restricting their validity to the persons to whom sold, and providing for their non-transferability, have been sustained. This proceeds upon the theory of the contract of the parties.

In analogous cases of the sale of non-transferable transportation tickets, it is held that a carrier may restrict the use of the ticket

to the original purchaser. The words "not transferable," or words of like import, printed on the ticket, will have that effect, and a third party can acquire no rights by virtue of such a ticket (10). The purchaser takes the ticket with notice of the limitations and conditions printed thereon, and is bound thereby (11). Such a non-transferable ticket gives no rights to the transferee, and the manager may lawfully refuse to honor it (12). The condition is valid, and the transferee cannot use the ticket.

Upon this point in *Purcell vs. Daly* the court said:

"It is unnecessary to discuss the question whether a person to whom tickets of admission to a theater are issued has the right to transfer them to a third party, as under the peculiar form of ticket in the present case the point is not at issue. The ticket can only be received as evidence of the oral contract made between defendant A or S. The contract is in effect as though A or S had applied for admission to Daly's theater, and Daly had said, "I will sell you the right of admission for two persons (for yourself and another) to my theater, but you must not transfer the ticket to anybody else, for I will not receive the same if it is so transferred.' This was the gist of the contract between the parties and, as admission was not refused either to A or S to witness the performance on the night for which the tickets were issued, no breach of contract on part of the defendant occurred. There was no agreement on part of the defendant to refund the money in case the tickets so issued were not used, and hence, under any aspect of the case, the only liability on part of the defendant would have resulted from his refusing admission to the theater to the person to whom the tickets were issued, and as this was not done, there should be judgment for defendant, dismissing the complaint" (13).

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(10) *Am. & Eng. Enc. of Law*, (1 St. Ed.) Vol. 25, p. 1091.

(11) *Coburn vs. Morgan's Co.*, 29 So. 882; *Boylan vs. H. S. R. Co.*, 132 U. S. 50; *N. Y. Ry. Co. vs. Bennett*, 50 Fed. 496; *Drummond vs. S. P. Co.*, 25 Pac. 733, 7 Utah, 118; *Post vs. R. R. Co.*, 14 Neb. 110, 15 N. W. 110; *Comer vs. Foley*, 25 S. E. 671; *Rahilly vs. R. Co.*, 68 N. W. 853; *Friedenrich vs. R. Co.*, 53 Md. 201; *Way vs. Ry. Co.*, 64 Ia. 48, 19 N. W. 828; *Walker vs. R. R. Co.*, 15 Mo. App. 333; *Pittsburg Ry. Co. vs. Russ*, 57 Fed. 822; *Cody vs. R. R. Co.*, 4 Sawy. 114; *Fetter, Carriers*, Sec. 282 *et seq.*; *Hale, Bailments & Carriers*, Sec. 109.

(12) *Purcell vs. Daly*, 19 Abb. Cas. (N. S.) 301; *Collister vs. Hayman*, 75 N. Y. S. 1102.

(13) See also *Collister vs. Hayman*, 75 N. Y. S. 1105.

CHAPTER IV.

Rights After Revocation.

After the revocation of the license implied in the sale of the theater ticket, necessary force may be used, if required, to render effective the revocation, without subjecting the proprietor of the theater to tort liability.

The holder of the ticket may be forcibly prevented, if necessary, from entering the theater, or, if he has already entered the theater, he may be ejected therefrom, after reasonable notice to leave.

In making effective the revocation, or in removing a person from the theater for any other cause, the proprietor of the theater, and his servants, are civilly responsible for any undue, excessive, willful or malicious violence or injury inflicted upon spectator (1).

In *Wood vs. Leadbitter* (2) the action was for assault and false imprisonment. The plaintiff having beeen requested to leave the enclosure, and refusing to go, was forcibly ejected, no unnecessary violence being used. The court held that due notice having been given, and a reasonable time having elapsed, the force used was proper. The judgment was for defendant. In *Burton vs. Scherpf* (3), the action was for assault and battery. The trial court ruled that the plaintiff could recover in that form of action, and verdict was rendered for the plaintiff. The case was reversed on appeal to the Supreme Court, the Judge saying: "By remaining there afterwards, and refusing to depart upon request, he (plaintiff) became a trespasser; and the defendant had a right to remove him by the use of such degree of force as his resistance should render necessary for that purpose. It is not alleged that in the exercise of this right the force used was at all excessive, or more than was requisite to effect his removal in a reasonable manner from the premises. * * * Upon his (plaintiff's) refusal to leave the hall to which his ticket gave him admittance, the defendant had the lawful right to remove him. For such removal an action of trespass cannot be maintained."

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(1) *Hale, Bailments & Carriers,* p. 536; *Fetter, Carriers,* Sec. 334; *Dickson vs. Waldron,* 135 Ind. 507, 41 Am. St. Rep. 440 24 L. R. A. 483 34 N. E. 506; *Drew vs. Peer,* 93 Pa. St. 234; *Fowler vs. Holmes,* 3 N. Y. S. 816.

(2) 13 M. & W. 838.

(3) 83 Mass. 133, 79 Am. Dec. 717.

In *McCrea vs. Marsh* (4) the action was in tort for forcibly excluding plaintiff from a theater after he had bought and offered at the door one of the usual "dress circle" tickets. Verdict for defendant. The court said: "It was correctly ruled at the trial that the plaintiff could not maintain this action, and that his remedy, if any, was by an action of contract. * * * After it (the ticket) was revoked, the plaintiff's attempts to enter were unwarranted, and the defendant rightfully used the force necessary to prevent his entry" (5).

For the revocation of the license given by the sale of the ticket, the ticket holder may sue the proprietor in an action for breach of contract (6).

The measure of damage would be the price paid for the ticket, and all other legal damage which the ticket holder has sustained by the breach of the contract implied in the sale and delivery of the ticket.

It was said by the court in the case of *Wood vs. Leadbitter*, after referring to the fact of a consideration having been paid for the ticket: "But that fact makes no difference; whether it may give the plaintiff a right of action against those from whom he purchased the ticket, or those who authorized its being issued and sold to him, is a point not necessary to be discussed; any such action would be founded on a breach of contract, and would not be the result of his having acquired by the ticket a right of going on the stand in spite of the owner of the soil."

It was held in *Burton vs. Scherpf* that for the revocation of a ticket of admission to a concert, the only remedy the holder of the ticket had was to sue for a breach of contract; and in *McCrea vs. Marsh* it was likewise held that for refusal to admit a ticket holder to a theater his only remedy was an action on the contract to recover the money paid for the ticket and damages sustained by the breach of the contract implied by the sale and delivery of the ticket.

Judge Monell, in delivering the opinion in *Purcell vs. Daly* makes use of the following language upon the subject of damages for revocation of the ticket:

"If tickets are sold to a person, the proprietor may still refuse admission, in which case the proprietor would be compelled to refund

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(4) *McCrea vs. Marsh*, 12 Gray, 211.

(5) See *Greenberg vs. Western Turf Assn.*, 140 Cal. 357; 73 Pac. 1050. In this case, which arose under an express statute of the state, it was held that it was within the province of the Legislature under the police power, to destroy the revocability of the ticket of admission to a place of amusement.

(6) *Kerrison vs. Smith*, 2 Q. B. 445.

only the price paid for the tickets of admission, together with such other expense as the party might have been put to, but which expense must be directly connected with the issuing of the ticket of admission. For he could not accept money for the right of admission to his theater, and then, upon refusing admission, seek to retain possession of the price paid for the privilege."

The implication from the language of the court in this case is that the damages sustained from the revocation of the ticket would be confined within a narrow compass, and must be "directly connected with the issuing of the ticket of admission." This, of course, would exclude the idea of indirect or remote damage, for it is a general principle of the law that only those damages which are the proximate and direct consequence of the act complained of are recoverable (7).

It has been held that the holder of a ticket of admission cannot specifically enforce the right of admission evidenced by the same (8), nor can the manager be enjoined from refusing to accept tickets sold by him (9). This would necessarily follow from the character of the theater ticket as a mere revocable license.

Miscellaneous

The manager of a theater has the right to sell reserved seats (10), but he is not bound to sell any chosen seat to the person who first presents himself and tenders the price, or to any particular person (11), nor may he be required to return the purchase price of a ticket which has been once sold (12). It is held that a person who visits a theater or a place of public amusement or entertainment is entitled to a seat, his right thereto depending on the nature of his ticket. If he has purchased a reserved seat, he is entitled to the seat corresponding to the coupon attached to his ticket. If he has not purchased such a seat, he may take any seat unoccupied which

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(7) In *Greenberg vs. Western Turf Assn.*, 140 Cal. 357, 73 Pac. 1050, there is a full and lucid discussion of the subject of damages recoverable for revocation of a theater ticket.

(8) *Malone vs. Harris*, 11 Irish Ch. Rep. 33; *Scott vs. Howard*, 6 App. Cases, 295, House of Lords, 1881.

(9) *Collister vs. Hayman*, 75 N. Y. S. 1102.

(10) *Dist. of Columbia vs. Saville*, 1 McArthur, 581. 29 Am. Rep. 616.

(11) *Pearce vs. Spaulding*, 12 Mo. App. 141.

(12) *Wandall, Law of the Theater*, p. 249; *Purcell vs. Daly*, 19 Abb. Cas. (N. S.) 301.

has not been previously sold to another (13). It is held also that the purchaser of standing room is not entitled to a seat, but in such case he should be informed that standing room only is being sold (14). It has also been held that a person has no right to go into that part of the theater, admission to which he is not entitled to under his ticket. He has no right to go into a reserved seat or a private box, and if he does so he may be ejected, using no more than necessary force. His proper course, if there is not room, is to go out of the theater and demand the return of his money (15). The theater ticket being a non-transferable and non-assignable license (16), a return check given to one lawfully attending a theater after the entertainment has begun is likewise non-transferable, and if assigned by the person to whom it is given it may be revoked at the pleasure of the manager. Where tickets have by mistake been sold for the wrong night, and the purchaser has been ejected from the seats occupied, no violence or force being used, the manager is not liable for exemplary or punitive damages for the mistake of his employees (17). In another case it was held that where one has purchased a general admission to the theater without knowledge that an additional price was charged for seats in a certain part of the theater, he may occupy one of the latter seats without payment of the extra charge until informed by the management that an extra price was charged therefor, and demanded of him, and that he should be allowed to remain in the theater, in the absence of improper conduct on his part, although it was necessary to remove him from such seat (18).

While it is customary for the management of many theaters to issue free tickets of admission, yet this privilege may be limited by contract, and where such practice is carried on to such an extent as to injure the interests of the stockholders or other persons interested in the theater, it may be restrained by injunction, or an accounting enforced (19). The right of free admission cannot be specifically enforced (20).

Forgery may be committed in printing spurious tickets, for this crime may be consummated by printing or stamping as well as by writing with the pen (21).

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(13) *Com. vs. Powell*, 10 Phila. 180.

(14) *Vanderberg vs. Harris*, 5 Gibson's Law Notes †

(15) *Lewis vs. Arnold*, 4 C. & P. 354.

(16) *Collister vs. Hayman*, 75 N. Y. S. 1102; 12 Cent. Law J. 393.

(17) *MacGowan vs. Duff*, 12 N. Y. St. Rep. 680.

(18) *McGovery vs. Staples*, 7 Alb. L. J. 219.

(19) *Baker's Appeal*, 108 Pa. St. 510, 56 Am. Rep. 231; *Arons vs. Lewis*, 3 Vict. 79.

(20) *Malone vs. Harris*, 11 Ir. Ch. Rep. 33.

(21) *Benson vs. McMahon*, 127 U. S. 457.

CHAPTER V.

Audience's Right to Criticise.

The right of an audience to manifest their approbation or censure, or to indicate their feelings regarding the play and the players, is confined within a narrow compass. The theater is a place of public amusement, to which large numbers of people resort for pleasure and amusement. The spectator is a licensee, and it is conceived that he is under the same duty to refrain from a breach or disturbance of the peace and to observe reasonable regulations imposed for due order and propriety as would be required of him elsewhere in public places.

The audience in a public theater have a right to express their feelings, excited at the moment by the performance, and in this manner to applaud or hiss any piece which is represented, or any performer who exhibits himself on the stage. They may express their free and unbiased opinion of the merits of the play or the performers, in a reasonable manner. But if a number of persons attend a theater with the predetermined purpose of hissing an actor, or the play, they are guilty of conspiracy, and if the disturbance is so great as to interrupt the piece, and to render the actors entirely inaudible, though without offering personal violence to any individual or doing any injury to the house, they are in point of law guilty of riot.

The leading case upon the subject of the rights of the audience to express their opinions of the play and the players is that of *Clifford vs. Brandon* (1), wherein the Chief Justice said in stating the law to the jury:

"As to the existence of a riot in the house, no doubt can be entertained. It appears that for a great many nights there were riots there of such a nature as to go to put an end altogether to dramatic representation. I cannot tell upon what grounds many people conceive they have the right, at a theater, to make such a prodigious noise as to prevent others from hearing what is going forward on the stage. * * * These premeditated and systematic tumults have been compared to that noise which has been at all times witnessed at theaters in the immediate expression of the feelings of audiences upon a new piece, or the merits or defects of a particular performer. The cases, however, are widely different. The audience have certainly a right to express by applause or hisses the sensations

(1) *Clifford vs. Brandon*, 2 Campbell, 358.

which naturally present themselves at the moment, and nobody has ever hindered, or would ever question, the exercise of that right. But if any body of men were to go to the theater with the settled intention of hissing an actor, or even of damning a piece, there can be no doubt that such a deliberate and preconcerted scheme would amount to a conspiracy and that the persons concerned in it might be brought to punishment. If people endeavor to effect an object by tumult and disorder, they are guilty of riot. It is not necessary to constitute this crime that personal violence should have been committed, or that a house should have been pulled to pieces. I am clearly of the opinion that the scenes which have been described amount to a riot. How can it be said there was no terror? Would any of the jury allow their wives and daughters to go to the theater during these disturbances? Must not those who entertain a different opinion upon the matters in dispute, and are friendly to the managers, expect to meet violent ill-treatment? The jury will consider, then, whether Mr. Clifford was an instigator of the riot, which one of his witnesses has represented as resembling a quarrel among a thousand sailors. The law is that if any person encourages or promotes or takes part in riots, whether by words, signs or gestures, or by wearing the badge or ensign of the rioters, he himself is considered a rioter, and he is liable to be arrested for a breach of the peace."

In a note on this case the reporter adds:

"Macklin, the famous comedian, indicted several persons for a conspiracy to ruin him in his profession. They were tried before Lord Mansfield, and it being proved that they had entered into a plan to hiss him as often as he appeared on the stage, they were found guilty under his Lordship's direction, but the prosecutor declined calling upon them to receive the judgment of the court."

In the case of *Gregory vs. Duke of Brunswick* (2), the action was for conspiracy to prevent the plaintiff from performing in "Hamlet," and in aid of the conspiracy hiring 200 persons to hiss and hoot, by which he was prevented from performing. Tindal, C. J., said:

"The law on this subject lies in a narrow compass. There is no doubt that the public who go to a theater have the right to express their free and unbiased opinions of the merits of the performers who appear upon the stage. * * * At the same time, parties have no right to go to a theater by a preconcerted plan, to make such a noise that an actor, without any judgment being formed on his performance, should be driven from the stage by such a scheme, probably concocted for an unworthy purpose."

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(2) 6 M. & G. 205.

And in *Rex vs. Forbes* (3) it is said, regarding the right of the audience:

"They may cry down a play or other performance, which they dislike, or they may hiss or hoot the actors who depend upon their approbation or caprice. Even that privilege is confined within its limits. They must not break the peace, or act in such a manner as has a tendency to excite terror or disturbance. Their censure or approbation, although it may be noisy, must not be riotous. That censure or approbation must be the expression of the feelings of the moment, for, if it be premeditated by a number of persons confederated beforehand to cry down even a performance of an actor, it becomes criminal."

In the very interesting case of *People vs. Judson* (4), which illustrated the strong enmity existing between Macready, the well-known and eminent English tragedian, and Edwin Forrest, the equally well-known and eminent American tragedian, in consequence of which an effort was made by some of Forrest's partisans to prevent Macready from giving a performance at the Astor Place Opera House in New York City in May, 1849, upon the occasion of the first night of his reappearance there, the tumult in and around the theater was great, feeling running high, and many were injured. Ten persons were indicted for engaging in a riot and convicted. On the trial the court said in charging the jury:

"That the privilege of an audience at a theater to give spontaneous expression to the feelings of approbation or disapprobation which the representation inspires is of immemorial usage, but it does not imply the right to create a tumult in the theater, to throw missiles at the actor, to destroy property, or the right of a few to give or continue the expression of their disapprobation in such a manner as to prevent the majority present from witnessing the performance if they desire to do so. Nor have a number of persons the right to combine together and go to the theater to prevent a dramatic representation by noise or tumult, or to hiss a particular actor who may be obnoxious to them, or prevent his performing."

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(3) 1 Craw. & D. 157.

(4) 11 Daly (N. Y.) 1.

CHAPTER VI.

Liability of Managers.

The proprietor of a theater is civilly liable for the wrong or injury of his employees toward his guests or patrons, when such acts are performed by the employees in the line of their duties (1).

The employee whose duty it is to preserve order in and about the theater, and to remove offensive patrons therefrom, is necessarily the judge as to whether the conduct of the patron is so offensive and disorderly as to require his removal.

If such employee, however, acting in the line of his duty, makes a mistake and wrongfully attacks and injures an inoffensive patron, the proprietor is responsible for his acts.

The fact that such employee is a special policeman will not relieve the proprietor from liability.

The proprietor is also responsible for the acts of his agents in refusing admission to or in excluding from the theater persons who have obtained or who apply for admission to the theater (2).

In *Fowler vs. Holmes* (3) the action was brought by the plaintiff against defendant for an assault and battery committed on plaintiff by one alleged to be the servant of defendant. Defendant was the proprietor of a theater and had employed a traveling theatrical company to play for him in the theater. A member of the company was collecting tickets for the proprietor and attending to those who desired to exchange seat tickets for other seats, and while so engaged he was approached by plaintiff with the request to exchange his tickets for others. He ordered plaintiff to get in line and take his turn. His refusal to do so resulted in some words and thereupon an assault was committed by him upon plaintiff. A verdict for plaintiff was affirmed upon appeal, the court holding that there was sufficient evidence on which to submit to the jury the question as to whether the employee was defendant's servant, engaged in his business, and the assault was committed while acting within the scope of his employment.

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(1) *Fowler vs. Holmes*, 3 N. Y. S. 816; *Dickson vs. Waldron*, 135 Ind. 509; *Drew vs. Peer*, 93 Pa. St. 234; *Joseph vs. Bidwell*, 28 La. Ann. 382, 26 Am. Rep. 103; and see *Fire Department of N. Y. vs. Stetson*, 6 N. Y. St. Rep. 255.

(2) *Joseph vs. Bidwell*, 28 La. Ann. 383, 26 Am. Rep. 103.

(3) 3 N. Y. S. 816.

The leading authority upon this branch of the subject is *Dickson vs. Waldron* (4). Dickson and Talbott were the lessees and managers of the Park Theater in Indianapolis. Kiley was the head janitor of the theater and was also a ticket taker. At the request of Dickson and Talbott he was granted special police powers, such powers to be exercised at the Park Theater, and he was paid by Dickson. Kiley was not relieved of any of his duties in the theater by his appointment as a special policeman, and his appointment was made at the suggestion of the chief police officer to assist him in preserving order in the theater, and in the latter's absence Kiley acted for him.

One evening Waldron with some friends desired to attend the theater and they went to the ticket office and Waldron called for a ten-cent ticket, tendering Gordon, the ticket seller, a silver dollar and receiving in return a ticket and seventy cents in change. There was a wordy altercation as to the tickets and the change, Waldron refusing to leave until the difficulty as to the change was adjusted. Gordon then grabbed Waldron's money and ticket from him, slapped him in the face and applied opprobrious epithets to him, and called out "Police!" or "Johnny, arrest that man for a vag." Kiley then stepped up to Waldron and knocked him down and beat him severely about the head, arms and shoulders. Kiley withdrew for a time, somebody having interfered, and Gordon came out of the ticket office, grabbed Waldron and began pounding him in the face with his fist, knocked him down and kicked him several times. Kiley then arrested Waldron and sent him to the police station. The testimony of Kiley and Gordon showed that their treatment of Waldron was most brutal, and agreed with that of Waldron and his witnesses in the main facts. It was also in evidence that Kiley had hit Waldron with a mace and that Gordon ordered Kiley to arrest Waldron. The duties of Kiley, as testified to, were to take tickets at the door, supervise the cleaning of the house, and assist the chief police officer in making arrests and in preserving order.

Waldron brought suit against Dickson and Talbott for assault and battery and recovered a substantial judgment against them. The jury found that Kiley, while in defendant's theater, struck Waldron several blows upon the head with a mace, thereby inflicting severe wounds upon him, and that such blows resulted in his losing the hearing of his left ear, and otherwise disabling him, and causing him to lose his position as a freight conductor; that Waldron had

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(4) *Dickson vs. Waldron*, 135 Ind. 507, 41 Am. St. Rep. 440, 24 L. R. A. 483, 34 N. E. 506, affirmed on rehearing, 35 N. E. 1. This case has been made the text of an article in the *American Law Register* for June, 1894, 1 Am. Law Reg. (N. S.) 448.

violated no law or ordinance, and that Kiley had no warrant for Waldron's arrest, and that he was an employee of Dickson & Talbott, when assaulting Waldron, was acting as the servant and employee of Dickson & Talbott, engaged in their business, and acting within the general scope of the duties of his employment. The verdict for Waldron was sustained upon appeal.

In the opinion the court says: "The main question in this case, and perhaps the only one that need be decided, is, Whether appellants are liable to appellee for the injuries inflicted upon him by their employeee, John M. Kiley.

"The treatment due from a carrier to his passenger, from an innkeeper to his guest, and from a theatrical manager to his patron, while perhaps differing in degree, is similar in kind.

"The duty of a railroad company to its passengers is well expressed in *Indianapolis Union Ry. Co. vs. Cooper,* 6 Ind. App., 202. This was a case where a passenger, having purchased his ticket, was in the company's station on his way to the train, when he was assaulted by the 'gateman.' The court said: 'It seems to us reasonably clear that the servant was, at the time of doing the acts complained of, on duty for his master, and at or near his proper place, and that the assault was committed on appellee while he was on the master's grounds and under the charge of the master's servants, and entitled to their protection rather than their abuse. It (the railroad company) owed him an affirmative duty to protect him from the violence and insults of its own servants at the station. It is well settled that one who has purchased a ticket and is passing, at the proper time from the depot to the train, is a passenger. One of the prime duties resting upon a railroad company is to protect its passengers from assault and injuries by its servants, nor does the question of its liability for a breach of this duty depend upon whether or not the servant, in the performance of the act, is within the scope of his employment.'

"A corporation is liable to make compensation for any tort committed by an agent in the course of his employment, although the act is done wantonly and recklessly, or against the express orders of the principal.

"It is in general no excuse to the employer that an injury which has occurred was caused by disobedience of his orders, whether they be express or implied. He assumes the risks of such disobedience when he puts the servant into his business.

"In *Higgins vs. Watervliet Turnpike Co.*, 46 N. Y. 23, 7 Am. Rep. 293, it was claimed that no authority had been given to turn out an inoffensive passenger, and that therefore there was no liability for the servant's acts, but the court held that the authority to remove

an offensive passenger necessarily carried authority to determine whether any passenger was offensive or not. So here, the matter was about the master's business, and the servant of necessity must be the judge as to whether the conduct of appellee was such as to require his removal, and if a mistake was made, and an inoffensive patron of the theater was unjustly attacked and injured, the master must respond.

"It is not convenient for the master to conduct personally the business of keeping order in his theater, and he puts his guard in his place; therefore, if the guard forms a wrong judgment, the master is responsible.

"Indeed, no rule is better established than that a principal is responsible for the acts of his agent performed within the line of his duty, whether the particular act was or was not directly authorized or whether or not it was lawful.

"But common carriers, merchants, managers of theaters and others who invite the public to become their patrons and guests, and thus submit their personal safety and comfort to their keeping, owe a more special duty to those who may accept such invitation. Such patrons and guests have a right to ask that they shall be protected from injury when present on such invitation, and particularly that they shall not suffer wrong from the agents and servants of those who have invited them.

"It is said Kiley was a policeman, and therefore appellants are not responsible for his attack upon Waldron. Whether at the time of the injuries complained of, Kiley was acting as a policeman, or as agent of appellants, must depend upon the acts done by him. Because he was a police officer, it does not follow that all his acts were those of a policeman, and because he was an agent of appellant, that all his acts were those of such agent. Even if he were a regular patrolman called in off the street by appellants, or their agents, to aid in enforcing the regulations of the theater, he would, for such purpose, be only the agent of appellants, and for his conduct as such agent, within the scope of his employment, appellants would be responsible. If, however, after entering the theater, he should discover appellee in the act of violating a criminal law or a penal ordinance, and should proceed to arrest him for it, such act of arrest would be that of a police officer. And if such arrest were made upon the officer's own motion, without direction, expressed or implied, on the part of appellants, then appellants would not be responsible.

"Kiley's acts as a policeman were committed after he had assaulted and beaten Waldron. It could not be seriously contended that Kiley could do no wrong as janitor and doorkeeper, but that every

wrong done by him should be charged to his official character. This would enable a proprietor to have all his employees commissioned as police officers, and thus escape liability for their misconduct to their patrons.

"If Waldron had attempted to resist arrest, or had attempted to get away after arrest, and he had received his injuries in consequence of such attempts, or if he had committed any crime for which he should be arrested, there might be some reason for appellants' contention on that point. But, on the contrary, it is clear that appellee was innocent of any wrong doing for which he should be arrested; he never even struck back at either of his assailants. He neither resisted arrest nor tried to get away when arrested."

The proprietor or manager of a theater may be civilly liable for negligence because of injury occurring to a spectator desiring to attend, or attending, performances in the theater.

The proprietor or manager of a theater, to which the public is invited, is bound to use ordinary care and diligence to put and keep the theater in a reasonably safe condition for persons attending in pursuance of such invitation, and, if he neglects his duty in this respect, so that the theater is in fact unsafe, his knowledge or ignorance of the defects is immaterial, and he will be liable to a person injured (5). He must use reasonable care in the construction, maintenance, and management of it, having regard to the character of the exhibitions given, and the customary conduct of the spectators who witness them (6). He must supply a reasonably safe building (7), and stage appliances that will prevent the performers from injuring spectators (8). The entrances must be safe (9). The proprietor is not liable as an insurer of persons attending the performances. He is not bound to insure the spectators against any accident or injury whatever, but only such as a prudent man would have foreseen as a likely result of the condition of the theater; he is bound only to exercise reasonable care for their safety (10).

Where a spectator occupied with friends one of a row of boxes in a theater, and had hung his overcoat on a hook attached to the wall

(5) *Currier vs. Boston Music Hall,* 135 Mass. 414.

(6) *Scofield vs. Wood,* 170 Mass. 415, 49 N. E. 636.

(7) *Dunning vs. Jacobs,* 36 N. Y. S. 453; *Butcher vs. Hyde,* 30 N. Y. S. 1073.

(8) *Thompson vs. Ry. Co.,* 170 Mass. 577, 49 N. E. 912, 40 L. R. A. 345.

(9) *Oxford vs. Leathe,* 165 Mass. 254, 43 N. E. 92.

(10) *Dunning vs. Jacobs,* 36 N. Y. S. 453; *Am. & Eng. Enc. of Law,* Vol. 25, p. 1041.

in the rear of the box, while witnessing the performance, and the overcoat was stolen, it was held that the proprietor was not liable as a bailee of the coat, and that the spectator could not recover its value from him, there being no delivery of the coat to the manager for safe keeping (11).

The proprietor or manager of a theater may be both civilly and criminally liable for selling tickets in excess of the number of seats in the theater, where there are ordinances prohibiting the blocking of aisles by placing chairs therein, and providing that no person or persons shall be permitted to stand in or occupy any of the aisles during any performance.

These statutes are passed to secure the safety of the audience. Their object is to prevent sacrifice of life, and to facilitate egress from the theater in the event of fire, or other panic or casualty in the play-house. Such statutes are literally construed, and to recover the penalty given for a violation of the act, it is not necessary to prove that the manager knew that any persons were standing in the passage way, or that he gave any one permission to occupy the passage way. That a number of tickets were sold for a performance by the manager's agents, after they knew that the seats in the house were filled, is sufficient proof to sustain a judgment in absence of evidence that such sale was in opposition to the manager's wishes (12). The proprietor or manager of the theater, though it be let to another under the usual percentage contract, may be held responsible for a violation of such ordinance (13). In such an ordinance the word "aisle" means the aisle as actually constructed (14).

Where a theater has a front and a side entrance, both of which are permitted to be used, and people are permitted to stand in a space necessary for a passage way in the use of the side entrance, alone, the manager is liable to the penalty imposed by the law, forbidding the manager to cause or permit any person to occupy a passage way during a performance (15).

In several of the States there are laws prohibiting theatrical exhibitions on Sunday. These laws have uniformly been held con-

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(11) *Pattison vs. Hammerstein*, 39 N. Y. S. 1039.

(12) *Fire Dept. of N. Y. City vs. Stetson*, 14 Daly, 125, 6 N. Y. St. Rep. 255; *Fire Dept. vs. Hill*, 14 N. Y. S. 158.

(13) *Fire Dept. vs. Hill, supra.*

(14) *Sturgis vs. Coleman*, 77 N. Y. S. 886.

(15) *Sturgis vs. Hayman*, 84 N. Y. S. 126.

stitutional (16), and where there is a general law prohibiting laboring on Sunday it was held that one who sells tickets and manages an entertainment on that day is guilty of laboring within the purview of the statute (17).

Where there are laws prohibiting the sale of liquors in theaters or places of public amusement, the manager who permits such liquors to be sold in his amusement house is criminally liable (18).

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(16) *Am. & Eng. Enc. of Law*, Vol. 25, p. 1040.

(17) *Quarles vs. State*, 55 Ark. 10, 17 S. W. 269, 14 L. R. A. 192.

(18) *Thompson vs. State*, 47 Tenn. 553.

CHAPTER VII.

Theater Ticket Speculation.

Speculation in tickets of admission to theaters has attained such proportions in many of the larger cities of the United States that the public, as well as the managers of the most reputable theaters, have sought for means to destroy it. The practice has so grown in recent years that it has become not only an incidental inconvenience in the theatrical business, but a positive nuisance to the public. The interest of the proprietors of theaters, equally with that of the public, points to the necessity of a remedy for the evil. The ticket speculator serves no useful purpose, either to the theater or to the public. On the contrary, he is a detriment. His calling is not legitimate, for it is his business to gain possession of large numbers of tickets of admission—which are mere evidences of non-assignable licenses—and retain them for sale to the public at an enhanced price over the regular terms of admission. His profit, therefore, is made by taking advantage of the desires of the public to witness theatrical performances, admission to which, by craft, is made a monopoly in the hands of the speculator. The speculator interferes with the orderly management of the theater, for, by his control of tickets, he creates constant friction between the managers thereof and the public, and holding these tickets for an advanced and usually an excessive price over the regular terms of admission, endeavoring to take advantage of the immediate desires of theater goers, he thereby prevents, in many cases, patrons from witnessing the performances, and very frequently turns away from the theater possible patronage of the public. The inconvenience and difficulty to theatrical management created by the theatrical ticket speculator are well illustrated in the facts of the cases of *Purcell vs. Daly,* and *Collister vs. Hayman,* which are referred to herein.

Theater tickets being, upon principle, mere non-assignable licenses (1), the assignment of which puts an end to the license (1a), and

(1) *Collister vs. Hayman,* 75 N. Y. Sup. 1102; *Purcell vs. Daly,* 19 Abb. Cas. 301; *Wood vs. Leadbitter,* 13 M. & W. 838; *Flight vs. Glossop,* 2 Bing. (N. C.) 125; *Coleman vs. Foster,* 1 H. & N. 37; *Malone vs. Harris,* 11 Irish Ch. Reports, 33; *McCrea vs. Marsh,* 78 Mass. 211, 71 Am. Dec. 745; *Burton vs. Scherpf,* 83 Mass. 133, 79 Am. Dec. 717; *Am. & Eng. Enc. of Law,* Vol. 18, 1140; *Hopkins Real Property,* 165, 166; *Boone, Real Property,* title, Licenses, and cases cited.

(1a) *Dark vs. Johnston,* 55 Pa. St. 164, 93 Am. Dec. 732; *Jackson vs. Babcock,* 4 Johns. (N. Y.) 418; *Prince vs. Case,* 10 Conn. 375, 27 Am. Dec. 675; *Emerson vs. Fish,* 6 Me. 200, 19 Am. Dec. 206.

having usually printed upon them express provisions declaring their character as non-transferable licenses, the ticket speculator cannot sell the purchaser a right to admission to the theater. Without a breach of the contract involved in the original sale of the theater ticket, the manager may refuse admittance to the theater to the person who presents such a ticket bought from a speculator (2); nor would the speculator be liable civilly to the person to whom he sold the ticket for the refusal of the manager to accept it, for, in the analogous sale of a non-transferable ticket of transportation sold by a broker, it is held that the person selling the ticket does not from the sale undertake anything but the genuineness of the ticket, and therefore the broker is not liable to the purchaser for the carrier's refusal to transport him upon any other ground but the genuineness of the ticket (3).

The ticket speculator is therefore engaged in a business permeated with fraud, and in the general sale of theater tickets in his possession is perpetrating a fraud upon the public in that he is selling evidences of no enforcible right.

The refusal to accept tickets sold by speculators frequently leads to furore and violence in the midst of the large crowd that throngs the entrance to the theater, to the disturbance of the public peace and quiet, and the terror of women and children. The speculator is usually a hawker, and in accosting people going to and from the theater personally and by outcry, has a tendency to impede peaceful travel over the public highway.

The bona fide patrons of the theater, as well as the public, have the undoubted right to protest against the practice of theater ticket speculation, and to insist that the managers and the public authorities protect them from the exactions, the frauds and the nuisance of the speculator. The managers have also unquestioned equities in the matter which call for action by the State, for ample licenses are exacted of them, and having large property interests involved in their places of amusements, they contribute their full quota of taxation for governmental support.

Theaters are places of public amusement. Their history will show that they have immemorially been under the protection, regulation, license and control of the sovereign authority (4).

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(2) *Purcell vs. Daly, supra; Collister vs. Hayman, supra.*

(3) *Elston vs. Fieldman,* 57 Minn. 70, 58 N. W. 830

(4) *Wandall, Law of the Theater; Geary, Law of Theaters and Music Halls; Am. & Eng. Enc. of Law,* Vol. 25, p. 1020, *et seq.; Dill. Muno. Corp.,* Secs. 257-360; *Cooley, Const. Lim.,* p. 734.

"Theaters and other places of amusements exist wholly under the authority and protection of State laws; their managers are commonly licensed by the State" (5). Theaters are property devoted to a quasi-public use (6). They are property in a business affected with a public interest (7), and "where one devotes his property to a use in which the public have an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled, for the common good, to the extent of the interest he has thus created" (7a). They are properly a subject of the power of police regulation by the State (8).

If a business, as that of conducting a theater, is a proper subject of police regulation, whose property is devoted to a quasi-public use, and which is affected with a public interest, so must its incidents and accessories, as, for example, the issue or sale of tickets of admission thereto, be a subject of police regulation by the State (9). It is held that the State may regulate the subject of admissions to theaters (10). As theaters may be regulated, it has been held that an ordinance forbidding the sale of reserved seats after the doors of the theater are opened is valid (11). Another ground for the regulation of the sale of theater tickets is the fraud perpetrated upon

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(5) *Cooley on Torts*, p. 285.

(6) *People vs. King*, 110 N. Y. 418, 18 N. E. 245, 6 Am. St. 389; *Donnell vs. State*, 48 Miss. 661, 12 Am. Rep. 375.

(7) *Cooley, Const. Lim.*, 738; *Cooley, Principles of Const.*, p. 234; Harlan, J., in Civil Rights Cases, 108 U. S. 9.

(7a) *People vs. King, supra*, citing *Munn vs. Illinois*, 94 U. S. 113.

(8) *Am. & Eng. Enc. of Law*, Vol. 25, pp. 1022, 1026; *People vs. King, supra; Donnell vs. State, supra; People vs. Budd*, 117 N. Y. 1, 22 N. E. 680; *People vs. Walsh*, 22 N. E. 683; *Cooley Torts*, p. 285; *Cooley Const. Lim.*, p. 704, note 1; id., 738; *Nuendorff vs. State*, 52 How. Pr. 267; *Greenberg vs. Western Turf Assn.*, 140 Cal. 357, 73 Pac. 1050, and cases cited therein; *Cincinnati vs. Brill*, 7 N. P. (Oh.) 534.

(9) *State vs. Corbett*, 57 Minn. 345, 59 N. W. 317; *People vs. Lorenzen*, 128 Cal. 431; *Fetter, Carriers*, Sec. 265; *Burdick vs. People*, 149 Ill. 600, 36 N. E. 948.

(10) *Baylies vs. Curry*, 128 Ill. 287, 21 N. E. 595; *People vs. King*, 110 N. Y. 418, 18 N. E. 245, 6 Am. St. Rep. 389; *Messenger vs. State*, 25 Neb. 674, 41 N. W. 638; *Joseph vs. Bidwell*, 28 La. Ann. 382; *Donnell vs. State*, 48 Miss. 661, 12 Am. Rep. 375; *United States vs. Newcombe*, 11 Phila. 519, Fed. Cas. No. 15868; *Munn vs. Illinois*, 94 U. S. 113; *Greenberg vs. Western Turf Assn.*, 140 Cal. 357, 73 Pac. 1050; *State vs. Lasater*, 68 Tenn. 584.

(11) *Cincinnati vs. Brill*, 7 N. P. (Oh.) 534; *Contra, District vs. Saville*, 1 McA. 581, 29 Am. Rep. 616.

the public in the sale of non-transferable admission tickets (12).

The usual method of regulating theater-ticket brokers is by the imposition of a license upon those engaged in the business and by excluding them from hawking tickets within certain specified limits adjacent to the theater, under severe penalty (13). This is the method adopted by New York City, and these provisions are undoubtedly valid (14).

The privilege conferred by such a law licensing theater ticket brokers relates only to the right to buy and sell that which is purchasable and vendible, and such privilege cannot change the inherent nature of a theater ticket. The theater ticket is a mere personal license, and is neither salable nor transferable. Hence, notwithstanding such a privilege to sell theater tickets, the manager cannot be enjoined from refusing to accept the tickets sold by a ticket broker without the prohibited limits (15).

It has been shown that the police power extends to the regulation of the issue or sale of theater tickets (16), and under this authority, as well as under the right to regulate the pursuit of occupations, to control and regulate the disposition and use of property, to prevent frauds and to preserve public order and prevent nuisances, it would undoubtedly be held proper for the State or a municipality to prohibit the hawking or peddling of theater tickets upon the public streets (17). Assuming such tickets to be property in the strict sense of the term, the prohibition relates not to the "right of the owner to sell his goods, but to the manner in which he may sell them" (18), and is a provision against fraud upon the public. Such an ordinance would not contravene common right, nor would it be unreasonable (19). It would also be competent for a city or State to prohibit, with a penalty for violation of the law, the sale of theater tickets within

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(12) *Purcell vs. Daly; Collister vs. Hayman; Elston vs. Fieldman; State vs. Corbett; Burdick vs. People, supra; Commonwealth vs. Keary,* 48 Atl. 472.

(13) See *Collister vs. Hayman, supra.*

(14) *People vs. Bennett,* 113 Fed. 515.

(15) *Collister vs. Hayman, supra.*

(16) See note 9, *et seq.*

(17) *Shelton vs. Mobile,* 30 Ala. 540, 68 Am. Dec. 143; *Comm. vs. Gardner,* 133 Pa. St. 284 19 Atl. 550, 19 Am. St. Rep. 645, 7 L. R. A. 666; *Caldwell vs. Alton,* 33 Ill. 416; *Ex Parte Lorenzen,* 128 Cal. 431, 61 Pac. 68.

(18) *Comm. vs. Gardner, supra.*

(19) *Shelton vs. Mobile, supra.*

certain prescribed distances of the theater (20). Licenses and restrictions, in pursuance of the police power and of the right to tax occupations, may also be imposed upon the business of hawking, peddling or selling theater tickets; but such fees must conform to the general rules applicable to the subject of the imposition of license taxes (21).

In the issue and sale of tickets of transportation, many States have solved the railroad ticket scalper problem by the passage of laws which require carriers to issue tickets only through their authorized agents, and which prohibit transfers of such tickets by purchasers. These statutes vary in detail, but they have uniformly been sustained as a constitutional exercise of the police power (22).

It is held in the cases that these statutes do not deprive persons of property without due process of law, that the ticket is not taken or destroyed within the purview of constitutional prohibition, nor is the purchaser deprived of his right to use it, the only limitation being on his right to transfer it. It is held that there is no property in such a ticket in the hands of the purchaser, nor that a person has a constitutional right to insist that these contracts shall be transferable. Neither are such statutes invalid as class legislation. The best illustrative case upon this subject is that of *State vs. Corbett,* wherein the principles of law applicable are lucidly expounded.

There is a strong analogy between the transportation ticket and the theater ticket. Both are incidents and accessories to the respective businesses in which they are employed. The theater ticket, as is held with the transportation ticket, can be said to be a mere token,

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(20) *Collister vs. Hayman,* 75 N. Y. S. 1101; *Comm. vs. Bearse,* 132 Mass. 542, 42 Am. Rep. 450; *Myers vs. Baker,* 120 Ill. 567, 12 N. E. 79, 60 Am. Rep. 580, cited in *Com. vs. Netcher,* 55 N. E. 708; *State vs. Read,* 12 R. I. 137; *State vs. Stovall,* 103 N. C. 416, 8 S. E. 900; *State vs. Cate,* 58 N. H. 240; *Dorman vs. State,* 34 Ala. 216; *Barbier vs. Connolly,* 113 U. S. 27; *Whitney vs. Grand Rapids,* 71 Mich. 234, 39 N. W. 40; *Mangan vs. State,* 76 Ala. 60; *In re Ah Kit,* 45 Fed. 793; *Com. vs. Abrams,* 156 Mass. 57, 30 N. E. 79; *ex parte McClain,* 61 Cal. 436, 44 Am. Rep. 554; *People vs. Bennett,* 113 Fed. 515.

(21) 15 *Am. & Eng. Enc. of Law,* p. 290, *et seq.;* 21 *id.,* p. 770, *et seq.; McQuillan, Municipal Ordinances,* Chapters xiii, xiv.

(22) *Fry vs. State,* 63 Ind. 522, 30 Am. Rep. 238; *Com. vs. Wilson,* 14 Phila. 384; *State vs. Corbett,* 57 Minn. 345, 59 N. W. 317, 24 L. R. A. 498; *Burdick vs. People,* 149 Ill. 600, 36 N. E. 948, 24 L. R. A. 152; *Jannin vs. State,* 51 S. W. 1126, 53 L. R. A. 264; *E. E. vs. McConnell,* 82 Fed. 65; *State vs. Bernheim,* 46 Pac. 441; *Com. vs. Kearny,* 48 Atl. 472; *People vs. Warden,* 50 N. Y. S. 56; compare *People vs. Lorenzen,* 128 Cal. 432; *contra, People vs. Warden,* 157 N. Y. 116, 51 N. E. 1006, 43 L. R. A. 264. In this case, there is a vigorous dissenting opinion, and it is criticised in *Com. vs. Keary* and *Jannin vs. State, supra.*

voucher or receipt to show that the purchaser has paid the price demanded, and is likewise evidence of the contract. The theater ticket is evidence of the contract for a license to enter the theater; the transportation ticket for carriage. "Treating it as the contract itself, it is in the nature of a chose in action. No one with whom a carrier makes such a contract has an inherent constitutional right to insist that it should be assignable. At common law, all choses in action were non-assignable, and if the Legislature had deemed it necessary, in order to prevent the supposed evils, to provide that all transportation tickets should be non-transferable, or even to prohibit the issue of tickets altogether, we fail to see why they had not the power to do so" (23). But the theater ticket represents a non-assignable license, and a prohibition, by the State, of its transfer would be a mere legislative declaration of its inherent nature. It is not a vendible article; it is, upon principle, neither salable nor transferable (24). If, as the courts have held, the transportation ticket is not property, the same reasoning by which they attain that holding would apply with greater force to the theater ticket, it being the token of a revocable and non-assignable license, and lacking at least one of the essential elements of property—the quality of disposition or transmission by the holder thereof to another person. There is absent that complete dominion over it which is manifested in the right of property in a thing, and it is held that a license is not property (25). "The fact that the purchaser of a ticket is prohibited from selling it to whom he pleases does not 'deprive him of his property without due process of law.' The disposition of property may always be limited or regulated where public interests may so require" (26).

It is therefore believed that, upon the legal principles and reasoning referred to, and upon the strong analogy between transportation tickets and theater tickets, laws confining the sale of theater tickets to the duly authorized and appointed agents of the theater, and prohibiting their sale or transfer by other persons, would be sustained as a valid exercise of the police power.

Injunctions have been granted by the courts in pursuance of the equity jurisdiction to restrain ticket scalpers from selling non-transferable transportation tickets, assigned in violation of the orignal con-

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(23) *State vs. Corbett, supra.*

(24) *Collister vs. Hayman, supra.*

(25) *Lecroix vs. Fairfield,* 50 Conn. 321, 47 Am. Rep. 648; *Martin vs. State,* 23 Neb. 371, 36 N. W. 554.

(26) *State vs. Corbett, supra.*

tract of purchase (27), and it is possible that where the fraud and injury are such as to warrant it, an analogous remedy may be given to the manager to restrain a theater ticket speculator from selling non-transferable tickets of admission to the theater.

The City of San Francisco recently adopted a municipal ordinance which is designed to regulate the dealing in tickets of admission to places of public amusement and which, under its brief operation, has been effective in restricting the number of theater ticket speculators. The ordinance provides:

"It shall be unlawful for any person to sell in the City and County of San Francisco any theater ticket, or opera ticket, or ticket of admission to a place of amusement or entertainment, at any place other than the office of the management of said theater, place of amusement or entertainment, without first having taken out and obtained a license to be known as a Ticket Peddlers' License."

The license fee is fixed at three hundred dollars a month, and every person having a ticket peddler's license and every person engaged in the business of peddling theater, opera or amusement tickets shall, on demand of any officer of the Tax Collector's Department, or peace officer, produce and exhibit the same. A violation of the ordinance is punishable by fine or imprisonment, or both (28).

Tennessee is the only State, so far as known, that has legislated upon the subject of theater ticket speculation. In 1890 its Legislature passed a statute as follows:

"Any person other than a regularly authorized employee or agent of a theater, who shall offer for sale any ticket or certificate of admission to any theater, for the sake of profit, is hereby declared to be a ticket speculator," and required to pay an annual privilege tax. Every violation of the statute is made a misdemeanor, punishable by fine (29).

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(27) *R. R. vs. McConnell*, 82 Fed. 65; *Schubach vs. McDonald*, 65 L. R. A. 136.

(28) The constitutionality of this ordinance was sustained by the Superior Court of the City and County of San Francisco in a ***habeas corpus*** proceeding instituted to test the validity of the ordinance.

(29) Act, March 7, 1890, Ex. Sess. (Acts 1890, c. 4, p. 24.)

CHAPTER VIII.

Discrimination in Theaters.

Congress has no power to enact laws preventing discrimination between the white and colored races, and enforcing equality of right in theaters and other places of public amusement, this matter being confided exclusively to the States.

In the absence of State statutes to the contrary, the manager may exclude whom he may desire from the theater, and may make and enforce rules providing separation of races in the theater, and such separation in the theater may possibly be required and imposed by law.

Where the State has enacted a "civil rights" statute, there can be no discrimination based upon race, color or creed.

The subject of racial discrimination, the exclusion of colored people, their separation from persons of the white race in, and the regulation and recognition of their right of admission to, theaters and other places of like character, became a problem of much importance immediately after the close of the Civil War. The Thirteenth Amendment to the Federal Constitution abolished slavery. The Fourteeenth Amendment prohibits the States from making any law which shall abridge the privileges or immunities of citizens of the United States, or deprive any person of life, liberty, or property, without due process of law, or deny to any person the equal protection of the laws. The Fourteenth Amendment also made the colored man a citizen of the United States. It was conceived that these provisions of the Constitution gave persons of the colored race equality before the law, and that, under them, there could be no discrimination in public places, based upon color, it being assumed that the law demanded equal accommodation for all (1).

Acting under the powers which it conceived were directly conferred on it by the Fourteenth Amendment, Congress in 1875 passed what is commonly known as the "Civil Rights Bill" (2). This law provided "that all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement;

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(1) *Coger vs. Packet Co.*, 37 Ia. 145.

(2) 1 Act March 1, 1875, Secs. 1, 2.

subject only to the conditions and limitations established by law and applicable alike to citizens of every race and color, regardless of any previous condition of servitude." Severe fines and penal damages were provided for an infraction of the provisions of the act.

The constitutionality of this law was soon tested in the Federal courts and was passed upon by the Supreme Court of the United States in what is commonly known as the "Civil Rights cases" (3), which were five cases decided together. One was an information for refusing a colored person a seat in the dress circle of Maguire's Theater in San Francisco, and another was an indictment for denying to another person the full enjoyment of the accommodations of the theater known as the Grand Opera House in New York City, "said denial not being made for any reasons by law applicable to citizens of every race and color and regardless of any previous condition of servitude." In these cases the "Civil Rights Bill" was declared unconstitutional, as not being authorized either by the Thirteenth or Fourteenth Amendment. "It was held in these cases that the Fourteenth Amendment is aimed solely at State action, and not the action of individuals not sanctioned by State legislation or the authority of the State. * * * It was further held that the act could not be sustained under the Thirteenth Amendment, abolishing slavery, since the refusal to any person of the accommodations of an inn, or a public conveyance, or a place of public amusement, by any individual, and without any sanction or support from any State law or regulation, does not inflict upon such person any manner of servitude or form of slavery, as these terms are understood in this country" (4).

As the legislation which Congress is empowered to enact is merely corrective of discriminating State laws, and as "individual right is not the subject of the amendment" (5), and as Congress could not reach or prohibit the actions of individuals, the managers of theaters, in the absence of State laws regulating the subject, were free to make such regulations regarding their patrons as they saw fit. They exercised the same rights of control in these private concerns as they theretofore enjoyed.

"The business of conducting a theater or places of amusement is a private business enterprise, in which, in the absence of any statute or ordinance prohibiting, any one may engage. As the theater is a private business enterprise and the ticket of admission a mere license,

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(3) 109 U. S. 9.

(4) *Fetter, Carriers,* Sec. 256.

(5) *Civil Rights Cases,* 109 U. S. 9.

revocable at the pleasure of the proprietor, the proprietor may make whatever regulations for the conduct of his business he chooses, and may refuse admission to any one without assigning any reason therefor" (6). "The theater is private property, and is governed so far as the public is concerned by such rules and regulations as defendant (the manager) may see fit to make. It is in no sense a public enterprise, and is consequently not governed by the same rules which relate to common carriers and other public institutions of like character. This being so, the proprietor has a perfect right to say who he will or will not admit to this theater, and should any one apply at the box office and desire to purchase tickets and be refused, there can be no question that he would have no cause of action against the proprietor of the theater" (7). "Theaters are not necessaries of life, and the proprietors may manage their business in their own way. If that way is unfair or unpopular, they will suffer in diminished receipts" (8). It therefore follows that the proprietor or manager of a theater, in the absence of a State law prohibiting discrimination, or regulating admission to theaters, could exclude persons of the colored race from his theater, or, in his discretion, make and enforce rules providing for a separation of white and colored people therein. In *McCrea vs. Marsh* (9), and in *Burton vs. Scherpf* (10), persons were excluded from the theater solely on the ground of color (11).

The proprietor of a theater may, in the absence of State legislation, lawfully make and enforce rules that colored persons shall occupy separate accommodations in the various grades of seats in his theater.

This proposition was determined in the case of *Younger vs. Judah* (12), decided by the Missouri Supreme Court in 1892. The action was instituted by Simpson C. Younger, a colored man, against Abram Judah, to recover damages for the alleged wrongful refusal of defendant's servants to permit plaintiff to occupy seats in defendant's theater,

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(6) *Am. & Eng. Enc. of Law*, Vol. 25, p. 1038.

(7) *Purcell vs. Daly*, 19 Abb. N. C. 301.

(8) *Clifford vs. Brandon*, 2 Camp. 358; *Pearce vs. Spaulding*, 12 Mo. App. 141.

(9) 12 Gray, 211; 71 Am. Dec. 745.

(10) 1 Allen, 133; 79 Am. Dec. 717.

(11) See *Bowlin vs. Lyon*, 67 Ia. 536, 56 Am. Rep. 355; *Grannen vs. Racing Assn.*, 153 N. Y. 465, 47 N. E. 896.

(12) 111 Mo. 303, 19 S. W. 1109, 16 L. R. A. 558.

for which he had purchased tickets. Younger and another colored person had purchased two orchestra seats, but after entering the theater were refused the seats, and were offered the return of the money paid, or seats in the balcony, the rule of the house being that colored persons should occupy seats in the balcony. There was judgment for the defendant, which was affirmed on appeal.

In sustaining the judgment the Supreme Court said: "The tickets for seats in the orchestra were sold to the plaintiff on the supposition that they were to be used by white persons. It is clear, too, that defendant had a rule to the effect that colored persons attending his place of amusement should occupy seats in the balcony; and the only real question in this case was whether he had the right to make and enforce such a rule. If he had, the plaintiff had no cause of action. It is earnestly insisted that such a rule amounts to discrimination against colored persons, and that such discrimination is prohibited by the Fourteenth Amendment of the Constitution of the United States. The clauses of that amendment relied upon by the plaintiff are those whereby it is declared that "no State shall make or enforce any law which shall abridge the privileges and immunities of the citizens of the United States, nor deny to any person within its jurisdiction the equal protection of the laws.' These clauses do not undertake to confer new rights, nor do they undertake to regulate individual rights. They are simply prohibitory of State legislation and State action. This was held in the 'Civil Rights cases.' As there stated, 'individual invasion of individual rights is not the subject of the amendment.' This State has enacted no law having any application to the present case. It does not undertake to say how theaters and other places of amusement shall be managed. As the State does not by itself regulate, or through the City of Kansas undertake to regulate, theaters, and, as the clauses of the Fourteenth Amendment are prohibitory of State action only, they have nothing to do with the question in hand. There is nothing upon which the prohibitions can operate. * * *

"Many of the States have enacted laws known as 'civil rights statutes,' and we are cited to cases upholding and giving effect to such laws. But as we have no such statute, these cases furnish no aid in the solution of the question now in hand.

"It is conceded that a common carrier may make and enforce reasonable rules for seating passengers, and it has been held that such a carrier, in the absence of any statute to the contrary, may separate white and black passengers in a public conveyance.

"If common carriers may make and enforce such rules, there can be no good reason assigned why proprietors of theaters may

not do the same thing. This being so, it is not necessary to a proper disposition of this case to say how far or to what extent theaters are to be regarded as public places; nor is it necessary to say to what extent they may be made public places by statute or local municipal law. In any event, the proprietors of theaters may make and enforce such rules as the one now in question. The defendant's rule was no more than a reasonable regulation which he had a right to make and enforce."

There are in the Constitutions of several of the States provisions for the enjoyment of civil rights (13), and there are laws in most of the States providing that no citizen of the State shall, by reason of race, color, or previous condition, be excepted or excluded from the full and equal enjoyment of the accommodations and privileges of inns, hotels, restaurants, common carriers, theaters and other places of public amusement (14). Such laws prohibit discrimination in the public or quasi-public places. These statutes have uniformly been held valid as a proper exercise of the police power (15), and nearly all of them are couched in similar terms, the "Civil Rights Bill," passed by Congress and declared unconstitutional, being taken as the model. Some States make non-compliance with the statute a penal offense, and others give merely a civil remedy.

The scope and purpose of these laws have been well defined in the adjudicated cases. "The purpose of the statute," says the court in one case, "was to declare that no person should be deprived of any of the advantages enumerated, upon the ground of race, creed or color, and that its prohibition was intended to apply to cases of that character, and to none other. It is plain that the Legislature did not intend to confer upon every person all the rights, advantages and privileges in places of amusement, or accommodation, which might be enjoyed by another. Any discrimination not based upon race, creed or color does not fall within the condemnation of the stat-

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(13) Const. Ala., Art. 1, Sec. 38; Const. Ark., Art. 2, Sec. 3; Const. La., Art. 13, Sec. 188; Const. S. C., Art. 1, Sec. 39; Const. Va., Art. 2, Sec. 2; Const. Fla., Art. 14, Sec. 1.

(14) Arkansas, California, Florida, Illinois, Indiana, Massachusetts, New Jersey, New York, Ohio, Rhode Island, Iowa, Nebraska, Michigan, Minnesota, Colorado, South Carolina, and perhaps several other states.

(15) *People vs. King*, 110 N. Y. 418, 18 N. E. 245, 6 Am. St. Rep. 389; *Baylies vs. Curry*, 128 Ill. 287, 21 N. E. 595; *Ferguson vs. Geis*, 82 Mich. 358, 46 N. W. 718; *Messenger vs. State*, 25 Neb. 674, 41 N. W. 638; *Cecil vs. Green*, 161 Ill. 265, 43 N. E. 1105; *Fruchey vs. Eagleson*, 15 Ind. App. 88, 43 N. E. 146; *Bryan vs. Adler*, 72 N. W. 368; *Rhone vs. Loomis*, 77 N. W. 32; *Donnell vs. State*, 48 Miss. 661, 12 Am. Rep. 375; *Barbier vs. Connolly*, 113 U. S. 27; *Joseph vs. Bidwell*, 28 La. Ann. 382.

ute" (16). "Under these laws," said the court in another case, "there must be and is an absolute, unconditional equality of white and colored men before the law. The white man can have no rights or privileges under the law, which are denied the black man. There can be no separation in public places between people on account of color alone which the law will sanction" (17). "The intent of the law," says the Court in another case, sustaining the constitutionality of the Mississippi equal rights statute, "is that all persons may have equal accommodations in vehicles of common carriers, at inns, hotels, theaters, and other places of public amusement, upon terms of paying the usual prices therefor. If they are excluded, it must not be on account of race" (18).

In the cases which have come before the courts for a violation of equal rights statutes, it is held that an indictment is sufficient where the words of the statute are followed (19), and in suing upon the statutory penalty, the pleading must show facts that bring the plaintiff within the statute (20). Where the statute is made applicable to all citizens within the State, it is valid so far as it relates to citizens (21), and there must be an allegation and proof that the person against whom there is discrimination is a citizen of the State (22). One who violates the law making it a misdemeanor for a person to discriminate in the places mentioned in the statute becomes liable to an action for civil damages, at the suit of the person injured by the discrimination, and it is not necessary in such action to declare upon, or in any way to refer to, the penal statute (23). Such statutes cannot by implication be extended, by general terms, to include places not mentioned therein (24). It is clear that there must be an allegation and proof that the person discriminated against was excluded upon the ground of color. It has

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(16) *Grannen vs. Racing Assn.*, 153 N. Y. 465, 47 N. E. 896.

(17) *Ferguson vs. Geis*, 82 Mich. 358, 46 N. W. 718.

(18) *Donnell vs. State*, 48 Miss. 661, 12 Am. Rep. 375.

(19) *People vs. King*, 110 N. Y. 418, 18 N. E. 245, 6 Am. St. 389.

(20) *Fruchey vs. Eagleson*, 15 Ind. App. 88, 43 N. E. 146.

(21) *Messenger vs. State*, 25 Neb. 674, 41 N. W. 638.

(22) *Messenger vs. State, supra.*

(23) *Ferguson vs. Geis*, 82 Mich. 358, 9 L. R. A. 589; *Joseph vs. Bidwell*, 28 La. Ann. 382, 26 Am. Rep. 102; *Baylies vs. Curry*, 128 Ill. 287.

(24) *Cecil vs. Green*, 161 Ill. 265, 43 N. E. 1105; *Rhone vs. Loomis*, 77 N. W. 32; *Keller vs. Koeber*, 55 N. E. 1002.

been held that evidence of a refusal to sell such persons tickets such as were sold to white persons who applied supports the allegation that they were excluded (25). Evidence to prove rules assigning separate but equal accommodations is inadmissible under equal rights statutes, and is no defense (26), and an offer to provide separate but equal accommodations is not a compliance with the statute (27), though the offer is made to a servant or agent (28). A denial of the right to accommodations by an agent renders the principle liable to civil damages (29). Where the statute provides that any person violating it shall forfeit to the individual injured a sum not to exceed a certain amount, and on conviction, a fine also, the amount to be forfeited is not controlled by the actual pecuniary loss or damage (30). Under the Ohio statute providing "that any person" who shall violate the law shall be punished, etc., it was held that an action for the penalty cannot be maintained against two persons as partners (31). The offender is criminally liable for a violation of the law (32). In a criminal prosecution, or in a civil suit for the penalty, for a violation of the equal rights statute, the gist of the complaint is exclusion or discrimination because of race or color, and for causes not applicable to all alike, it would be incumbent upon the party aggrieved not only to prove exclusion or discrimination, but that such exclusion or discrimination was made on the ground of race or color. In an action for the statutory penalty under a civil right law, where the complaint alleges that the privileges, etc., were denied because plaintiff was colored, other reasons why they were denied may be shown under the general denial (33).

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(25) *People vs. King*, 18 N. E. 245.

(26) *Baylies vs. Curry*, 128 Ill. 287, 21 N. E. 545; *Messenger vs. State*, 25 Neb. 674, 41 N. W. 638; *Fruchey vs. Eagleson*, 15 Ind. App. 88, 43 N. E. 146.

(27) *Ferguson vs. Geis*, 82 Mich. 358, 9 L. R. A. 589.

(28) *Fruchey vs. Eagleson*, 15 Ind. App. 88; *Bryan vs. Adler*, 72 N. W. 368.

(29) *Ferguson vs. Geis, supra.*

(30) *Fruchey vs. Eagleson, supra.*

(31) *Hargo vs. Meyers*, 4 Oh. Cir. Ct. 275.

(32) *Bryan vs. Adler, supra.*

(33) *Fruchey vs. Eagleson*, 15 Ind. App. 88, 43 N. E. 146. See note to *McCrea vs. Marsh*, 71 Am. Dec. 749.

Where there is a law prohibiting the giving of theatrical performances on Sunday, the sale of a theater ticket for a Sunday performance is illegal, and no action lies for refusing to admit the purchaser in violation of the civil rights law (34).

Where the owner of an opera house had rented the same to another, and the latter had absolute control and disposal thereof for the evening, except that the internal conduct thereof should remain under the exclusive control of the ushers, doorkeeper, and ticket agents in the employ and service of the owner, and a colored person was expelled from the opera house because of race, a nonsuit was granted in a suit against the owner, for the reason that he was not legally responsible or liable for the acts of those who made the expulsion (35).

The State of Tennessee has upon its statute books a most extraordinary law which is generally understood to have been passed to avoid the supposed effects of the civil rights law passed by Congress. It gives a right of action to the keeper of a theater against any person guilty of turbulent or riotous conduct within or about the theater (36).

"The first section of the act abrogates the common law giving a right of action to any person excluded from any hotel or public means of transportation or place of amusement, and gives to the proprietors of such hotels, places of amusement, or means of transportation, the right or option to admit or reject any person they may choose, giving the same right of control as the owner has over his private residence or private carriage.

"The second section is as follows: 'That a right of action is hereby given to any keeper of any hotel, inn, theater or public house, common carrier and restaurant, against persons guilty of turbulent or riotous conduct within or about the same; and any person found guilty of so doing may be indicted and fined not less than one hundred dollars, and the offender shall be liable to a forfeiture of five hundred dollars, and the owner or person so offended against may sue in his own name for the same.' "

This act was held constitutional as not violative of constitutional provision forbidding excessive fines and cruel and unusual punishments (37).

Many of the States have also passed laws requiring common car-

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(34) *Warren vs. Fountain Square Theater Co.*, 5 Low. D. 559, 7 N. P. 538.

(35) *Mackey vs. Tabor*, 22 Colo. 67, 43 Pac. 143.

(36) Act of 1875, Ch. 130, Sec. 2; M. & V. Code, 2298 b; Shan. Code, Sec. 3047.

(37) *State vs. Lasater*, 68 Tenn. 584; *Stover vs. Lasater*, 76 Tenn. 631.

riers, under penalty, to furnish separate but equal accommodations for white and colored passengers. These laws have been held to be a valid exercise of the police power of the State, and enforcible (38) so long as equality of right is maintained. Upon the same principles involved in the cases sustaining such laws, and in the exercise of the same power invoked to enact them, it is believed that similar legislation providing for the separation of the races in theaters, while maintaining equality of right in every particular, would likewise be held to be within the power of the States to pass.

In conclusion, it is suggested that the topics discussed in the preceding pages have been treated from the point of view of general law and fundamental doctrines. There may, in various places, be local customs or regulations affecting the subjects discussed, which could not conveniently, consistent with the general plan, be incorporated in the brochure. As to these, the admonition is given to the manager that it is his duty to become acquainted with such local laws, and to comply therewith. It is not conceived, however, that they could materially affect the status of the theater ticket or change the general rules of law already referred to.

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(38) *Fetter, Carriers,* Sec. 257.

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